# Commonwealth of Massachusetts
# State Ethics Commission

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**CONFLICT OF INTEREST OPINION**
**EC-COI-94-6***

**FACTS:**

You are the former Secretary of the Executive Office of Environmental Affairs (EOEA) and the former Chairman of the Board of the Massachusetts Water Resources Authority (MWRA). You completed your state service in these positions on January 4, 1991. You are currently employed as Regional Administrator for Region I of the United States Environmental Protection Agency (EPA). You seek guidance regarding the application of G.L. c. 268A in light of the following facts.

On January 31, 1985, the United States initiated a case against the MWRA, the Commonwealth of Massachusetts (including the Metropolitan District Commission (MDC)), and the Boston Water and Sewer Commission (Defendants) concerning the Boston Harbor. You state that the first phase of the case involved the establishment of initial cleanup orders. Specifically, between September, 1985 and August, 1987, the Defendants were found liable for primary and secondary treatment effluent limit violations, for discharging sludge, and for combined sewer overflow (CSO) violations. As a result, the court issued to the Defendants orders and schedules for the following:

(1) plan, design and construction of new primary treatment facilities by July, 1995, and secondary treatment facilities by December, 1999;

(2) implementation of sludge management measures, including the termination of sludge discharges by December, 1991

(3) completion of a facilities plan/environmental impact report (EIR) on long-term sludge management; and

(4) completion of a facilities plan/EIR on CSO abatement.

Compliance with these initial orders has been tracked through a report filed by the MWRA on the 15th of every month. Typically, the United States files comments regarding the MWRA's report, and the court issues a monthly tracking order.

You state that during your term as Chairman of the MWRA and Secretary of the EOEA, you were involved in certain facilities plans and EIRs designed to meet the court-imposed deadlines. In addition, during your tenure at the MWRA, various motions were made before the court, resulting in extensions and/or enforcement of the initial orders. The specific issues are as follows.

## 1. Combined Sewer Overflows (CSO)

During your state service, the MWRA was developing its initial Facilities Plan/EIR for CSO abatement work, pursuant to a court order in the enforcement case. The purpose of the CSO Facilities Plan/EIR was to identify CSO remedial work. The work was then to be scheduled by the Court to address the CSO violations.

You state that the initial MWRA Board decision about the direction the CSO Facilities Plan/EIR should take was made on December 14, 1988, prior to your taking office. The Facilities Plan/EIR was refined and developed during your tenure, however. Specifically, the Board was briefed on the CSO Facilities Plan/EIR issues on eleven occasions between March 8, 1989 and September 19, 1990. You state that you were present for these briefings on all but three occasions. Further, although you were not present for the meeting at which the final CSO Facilities Plan/EIR was approved by the Board for submission to the EOEA (the September 19, 1990 meeting), you were present for the final Board review of the draft plan on December 13, 1989, and a Board discussion of state regulatory policies on CSOs with Department of Environmental Protection Commissioner Greenbaum on February 14, 1990. At the April 11, 1990 Board meeting, you spoke in favor of taking an additional look at sewer separation projects (noting that it was still possible to conduct the necessary public comment process). You state that the MWRA Board minutes confirm that you did not otherwise contribute to the Board's discussion of CSO matters.

The final Facilities Plan/EIR was submitted by the MWRA to the EOEA. You state that you signed the 1990 EIR Certificate approving the plan on December 14, 1990, in your capacity as Secretary of EOEA.

After you left state service, the MWRA asked for a chance to reformulate its CSO Facilities Plan. The EPA concurred in this request. As a result, the MWRA is currently developing a new CSO plan. You anticipate that the new plan will seek to scale back proposals contained in the original plan which the MWRA Board (including you) approved, and which you approved, and signed, in your capacity as Secretary of EOEA.

You state that whether the EPA should approve or contest the new CSO is the primary question to be addressed by the EPA in the near future. Whether or not the EPA takes additional action will depend on the extent to which the new CSO plan meets the goals of the federal Clean Water Act. Additionally, the MWRA and the EPA will be negotiating a court schedule for the actual construction of the CSO abatement facilities. As EPA Regional Administrator, you would normally be involved in discussions concerning the most appropriate course of action for the EPA.

## 2. Sewage Treatment Sludge Issues

During your tenure as MWRA Board Chairman, the MWRA was developing its Facilities Plan/EIR for sludge (residuals) management. At its February 1, 1989 meeting, the Board made some initial basic decisions regarding the sludge plan. First, the

majority of the Board (including you) voted to approve the construction of a beneficial reuse sludge processing facility at the Fore River Shipyard in Quincy. Also, on your motion, the Board went on record as being against the use of sludge incineration.

At its July 12, 1989 meeting, the Board voted to eliminate composting from the beneficial reuse processes at the Quincy facility, relying only on sludge pelletizing, which remains MWRA practice. You voted in favor of this change in plans and answered questions about state regulations on beneficial reuse. Finally, at its August 16, 1989 meeting, the Board approved the final Facilities Plan/EIR for submission to the EOEA, recommending construction of the Quincy processing facility and the Walpole landfill. You were not present at that meeting. After the final Facilities Plan/EIR was submitted by the MWRA to the EOEA, you signed the November 20, 1989 Certificate approving the plan, in your capacity as EOEA Secretary. The Sludge Management Plan has been substantially revised since you left state service, with the substitution of out-of-state back-up landfilling for the Walpole landfill.

Court orders remain in effect requiring proper processing and disposal of the sludge. Issues relating to sludge management may arise in the case during the next several years. For example, if MWRA were to seek to scale back the pelletizing plant, EPA would have to accept or contest this in court.

### 3. Outfall Issues

The MWRA completed its Facilities Plan/EIR on the treatment plant outfall prior to your tenure as Chairman. However, in your capacity as EOEA Secretary, you signed the February 2, 1989 Certificate approving the draft findings under G.L. c. 30, §61, concerning that project's impact on the environment.[i/] Additionally, you signed the November 26, 1990 Certificate concerning the prior §61 finding. You state that although awards for construction of the outfall were made by the MWRA Board during your tenure as Chairman, you were not present for the meetings at which decisions on those contracts were made (January 24, 1990, April 25, 1990 and October 10, 1990).

Since you left state service, a lawsuit has been filed under the Endangered Species Act, challenging construction of the outfall. The EPA will need to address a number of outfall issues in the Boston Harbor case during the coming year. One such issue is a likely attempt by Cape Cod groups to intervene in the case, or otherwise seek to stop construction of the outfall or delay its use. In addition, EPA will continue its defense in a lawsuit filed pursuant to the Endangered Species Act, challenging the outfall construction. That suit is currently pending before the U.S. Court of Appeals following the EPA's victory in the District Court.

### 4. Secondary Treatment Issues

The construction of a secondary treatment plant is required by court orders obtained in the EPA's enforcement case. The secondary treatment Facilities Plan/EIR was completed by the MWRA prior to your tenure as MWRA Chairman. The original

Deer Island treatment plan called for, among other things, four secondary treatment batteries.

As early as May 9, 1990, the MWRA considered whether a secondary treatment plant would be needed to meet environmental standards. Minutes of the MWRA for that date indicate that the MWRA was then investigating claims by MIT Professor Harleman that such a plant would not be necessary if "advanced primary" chemical treatment was used. You state that you did not speak on the issue, nor were you involved in the investigation into Professor Harleman's claims. After you left the MWRA, the MWRA prepared and presented a proposal to consider scaling back the secondary treatment plant to construct only three, or two, secondary batteries. You state that this proposal is grounded upon considerations in addition to those expressed by Professor Harleman.

Construction of the new Deer Island treatment plan -- based on the original plan -- began while you were MWRA Chairman. You state that your role in that construction was limited to voting on contract awards for some of the work. Also, at its May 23, 1990 meeting, the Board (with you participating) approved a master schedule for construction of the original Deer Island project.

As in the case of the new CSO plan, EPA will have to accept or contest in court any new secondary treatment plan developed by the MWRA. As Regional Administrator, you will be involved in discussions concerning EPA's course of action on these matters.

**5. Federal Funding and MWRA Rates**

During your tenure as Chairman, MWRA rates and the need for federal and state funding were debated publicly and by the MWRA Board. At the January 18, 1989 Board meeting, the Board discussed the need for state and federal grant funding. There was a motion supporting state grant funding pursuant to the then-pending "Hayes Bill" in the state Legislature. You abstained on the motion, while noting the importance of federal funding. At the February 15, 1989 Board meeting, in connection with the review of the FY90 operating budget and rates, you again spoke on rate issues. You expressed concern about the rates and the need for funding by the federal and state government. At the June 28, 1989 Board meeting, in connection with the review of the proposed FY90-92 MWRA capital budget, you offered an amendment to hold down the rate increases by capping MWRA staff salaries. The amendment did not pass.

During the past year, the EPA commissioned a rate study comparing MWRA rates to rates elsewhere in the country in order to address the growing public perception that MWRA rates are among the highest in the country. Furthermore, the EPA often has to respond to Congress concerning the need for federal funding to alleviate the impact of the Boston Harbor cleanup on ratepayers.

EPA does not set MWRA rates nor itself appropriate federal funds for the MWRA. As Regional Administrator, you will be involved in discussions concerning federal funding and MWRA rates.

### 6. Clean Water Act Discharge Permit (NPDES) Issues

The MWRA's current discharge permit was last issued/renewed in 1986, before you became MWRA Chairman. You did not have any involvement in that permit application process.

The MWRA's discharge permit is up for renewal during the coming year. In connection with the pending permit renewal, issues will be raised relating to the new outfall.

### 7. The Central Artery/Third Harbor Tunnel Project

There are a large number of environmental issues concerning the Central Artery/Third Harbor Tunnel Project (CA/T). The project, first proposed in 1982, requires both federal and state environmental impact reviews. The EIR assesses the effects of the CA/T project will have on air quality, water quality, use of park land and the destruction of wetlands, among other issues.

The EIR process for the CA/T Project, administered jointly by the state and federal environmental agencies, was completed January 2, 1991, culminating in an EIR certificate which you signed in your capacity as EOEA Secretary. One section of the Project, the Charles River Crossing, was fully described in the CA/T EIR, but also was reserved for additional consideration in a supplemental EIR, which was to address concerns raised by area residents. The supplemental EIR process for the Charles River Crossing began after you left EOEA, and is still ongoing.

The EPA and the state are currently reviewing public comments on a draft environmental impact statement/environmental impact report (EIS/EIR) for the Charles River Crossing. According to your counsel, that review will focus on the impact of the Charles River Crossing project, as described in the CA/T EIR, versus the project as proposed in the draft supplemental EIR. At issue are the environmental mitigation measures to be implemented in connection with the crossing. The process will eventually end in an EIR signed by the EOEA Secretary. Furthermore, EPA will continue to review the proposed State Implementation Plan (SIP) revisions under the Clean Air Act, some of which may relate to mitigation measures which were required under federal and state environmental reviews.

**DISCUSSION:**

**Section 5**

Section 5(a) prohibits you, as a former state employee, from receiving compensation from *anyone other than the commonwealth or a state agency* in connection with any "particular matter" in which the commonwealth or a state agency is a party and in which you "participated" as a state employee.[ii]/

We have previously ruled that §5 is applicable where the former employee is subsequently employed by a private party *and* where the subsequent employer is a governmental entity. *See, e.g., EC-COI-78-1; 82-78* (former state employee subsequently employed by a city); *79-43; 79-54; 79-58; 79-59* (former state employee subsequently employed under contract with federal agency); *84-54* (§5 is applicable to former State Ethics Commission employee who becomes an Assistant United States Attorney).[iii]/

You challenge the Commission's reading of the words "anyone other than the commonwealth or a state agency" in §5 to include the federal government. Specifically, you argue that such a reading violates the Appointments Clause and/or the Supremacy Clause of the United States Constitution. We disagree.

The Appointments Clause of the United States Constitution, U.S.C.A. Const. Art. II, cl. 2 provides, in relevant part, that the President of the United States "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." You were appointed by the President.

You apparently argue that G.L. c. 268A, §5 violates the Appointments Clause by restricting your ability to perform certain functions of your appointed office. The simple answer here is that nothing in c. 268A, §5 seeks to control *how* a federal officer may be appointed to a federal post, or even *who* may be appointed. *Compare, Buckley v. Valeo,* 424 U.S. 1 (1975) (Federal Elections Commission members were "officers" within meaning of the Appointments Clause; Congress violated Clause by granting to itself the power to appoint four of the eight Commission members). Instead, §5 simply regulates the former state employee's conduct (once appointed to a federal position) with regard to particular matters in which he participated, or which were the subject of his official responsibility, while employed by the state.

Nor does Chapter 268A, §5 violate the Supremacy Clause which provides, in relevant part: "This constitution, and the laws of the United States which shall be made in pursuance thereof. . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." U.S.C.A. Const. Art. VI, cl. 2. Here, you apparently contend that §5 (as interpreted by this Commission) violates the Supremacy Clause to the extent that it operates to interfere with the performance of your appointed office. In essence, you argue that your federal statutory responsibilities preempt §5.

We begin our analysis by noting that "the [United States] Supreme Court, in recent years, has anticipated and imposed a presumption against preemption." Rotunda & Nowak, *Treatise on Constitutional Law: Substance and Procedure, 2nd* ¶2.1, p. 63; *see, e.g., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 132 (1978) ("This Court is generally reluctant to infer preemption...."). In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court said:

[S]tate law can be preempted in either of two general ways. [First,] If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Second,] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Id.* at 248 (citations omitted).

As to the first ground for preemption, you have not directed our attention to any act of Congress which "expresses a clear intent to preempt" G.L. c. 268A, §5 or statutes like it. *Louisiana Public Service Commission v. F.C.C.,* 476 U.S. 355, 368 (1986).[iv/] Therefore, we look to see whether c. 268A, §5 "stands as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). In particular, we look to see whether §5 does "major damage" to "clear and substantial" federal interests. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (noting that "mere conflict" between the words of two statutes does not imply federal preemption).

Clearly, nothing in §5 impinges on the EPA's ability to implement federal environmental policies, nor is §5 at odds with any area regulated by the EPA. Rather, here §5 simply operates to prohibit a single, albeit high ranking, EPA official from carrying out some of the functions of his office. That prohibition is attributable to the Massachusetts legislature's desire to regulate the conduct of former state officeholders, and not to any attempt on its part to forbid federal employment.

The argument which you advance is similar to that raised in *Lowrie v. Goldenhersh,* 716 F.2d 401 (7th Cir. 1983). In that case, the plaintiff was a United States Justice Department lawyer licensed by the State of Michigan, who sought admission to the Illinois bar without submitting to that state's bar examination. The Illinois admission rule required that the applicant reside and practice in his licensing state for at least five years. Plaintiff alleged that this rule burdened the hiring of federal lawyers who, according to plaintiff, are likely to reside and practice outside their licensing state, and thus violated the Supremacy Clause. In rejecting plaintiff's argument, the Seventh Circuit noted (1) that acceptance of a position with the federal government "is a voluntary decision, made in light of all applicable factors," including known or knowable bar admission requirements; (2) that the statute did not single out federal attorneys for special treatment, but imposed a burden borne by the majority of all Illinois applicants: (3) that there was "no national resolve" that attorneys in plaintiff's

position be admitted without satisfying the state's admissions criteria; and (4) that the functions of the federal government were not impaired by the stricture of the Illinois rule. *Id.* at 413; *see also Matter of Virgin Islands Bar Ass'n*, 758 F. Supp. 1088, 1091 (D. Virgin Islands 1991) (local rule that federal government attorneys admitted to practice in the District belong to the Virgin Islands Bar Association does not contravene statute authorizing appointment of Assistant United States Attorneys). Here, similarly, you voluntarily accepted your post with the EPA at a time when you were aware of G.L. c. 268A, §5.[V/] Second, our precedent indicates that §5 is applicable whether the former state employee seeks employment privately or with another level of government. Third, you have failed to direct us to any "national resolve" that states ought to be prevented from imposing like restrictions on the conduct of former state officeholders who are would-be applicants for federal office. Finally, nothing in §5 impairs the EPA's ability to carry out its statutory objectives, since there is no evidence to suggest that the functions you perform cannot be performed by another.

Furthermore, to the extent that you argue that any state statute which directly or indirectly narrows the field of possible federal appointees violates the Supremacy Clause, the Commission need only point to *O'Connor v. Jones,* 946 F.2d 1395 (8th Cir. 1991). In that case, plaintiff alleged that the Missouri Attorney General's practice of engaging private law firms for the defense of prisoner civil rights suits against state employees violated the Supremacy Clause by limiting the number of attorneys available to represent indigent prisoners. (The federal courts may request the services of counsel to represent an indigent party under 28 U.S.C. §1915(d)). In rejecting this argument the court said:

At most, the record shows that some attorneys, their number small in comparison to the total number of attorneys in the relevant geographical area, who otherwise would be available for appointment under section 1915(d) must be bypassed, and that the District Court, at some apparent inconvenience to itself, must keep those attorneys on a list separate from the regular appointment list. This is watery broth indeed, and it is far from sufficient to pass for a Supremacy Clause stew. *Id.* at 1399

We think that the reasoning of *O'Connor* is controlling here where, at most, §5 operates to reduce by one the number of persons who can carry out all of the functions of the Regional Administrator. Accordingly, absent a clear statement of the legislature to the contrary, we conclude that §5 is applicable to you, in your role as Regional Administrator. We now apply §5 to your specific facts.

**A. The Facilities Plan/EIRs**

The term "particular matter" includes "*any judicial or other proceeding*, application, submission, request for a ruling or other determination, contract, claim, controversy, . . . decision, determination, [or] finding. . . ." (emphasis supplied). Therefore, the ongoing litigation against the MWRA, the Commonwealth and others is a particular matter in which you participated while at the MWRA. *See, e.g., EC-COI-80-73; 80-45*. Not only is the Commonwealth a party to that litigation, but it is clear that any

legal determination made in course of that action regarding the MWRA's (and Commonwealth's) responsibilities to fund and implement programs to clean up the Boston Harbor is of direct and substantial interest to the Commonwealth.

We have previously held that the later stages of the same litigation constitute the same particular matter for purposes of the conflict law. *See, e.g., EC-COI-81-45* ("[A] follow-up ruling involving the same set of operative facts, . . . a fresh phase of an earlier proceeding, or . . . a subsequent renewal in what is essentially a continuing controversy should each constitute the same ['particular'] matter as the earlier situation") *quoting* Jordan, *Ethical Issues Arising from Present or Past Government Service, ABA, Professional Responsibility: A Guide for Attorneys,* 194 (1978); *see also EC-COI-91-1*. This principle is applicable here, particularly where the Facilities Plan/EIRs are mandated by court orders issued during the litigation; the MWRA's compliance with the orders is tracked through monthly reports to the court; the EPA regularly comments on the MWRA's compliance; and the EPA will assent to or challenge, as necessary, any of the MWRA's proposed changes or modifications to the court mandated Facilities Plan/EIRs. Accordingly, under 3(a), you are prohibited from working for the EPA with regard to the later stages of these plans. *See, e.g., EC-COI-80-73* (former state employee prohibited from representing private party in connection with an ongoing dispute regarding his former agency's jurisdiction); *80-87* (former employee prohibited from assisting private company in dealing with complaints raising issues similar to those covered in a settlement agreement with former employee's agency). That is, you may not take any action for the EPA "which in any way calls into question or seeks an interpretation of the terms of" Facilities Plan/EIRs which are part of the litigation in which you participated. *EC-COI-80-101.* It is immaterial whether the specific issue leading to a change in the plan arose before or after you left state service. *EC-COI-80-87.*

Although our precedent supports a ruling that your participation in the litigation alone prevents you from acting on behalf of the EPA with regard to the Facilities Plan/EIRS, we note that our decision would be the same even if the plans were not part of the litigation. We have stated that "[t]he environmental review process on a particular project, culminating in an environmental impact report is a particular matter within the meaning of the statute." *EC-COI-89-7.* And although our precedent is that an entire project which has distinct and distinguishable phases is not one particular matter, *see EC-COI-85-22,* we have expressly declined to extend this analysis to environmental impact reports. Rather, we have said that although the various stages leading to the development of such a report may be distinct, the environmental impact report itself is a single particular matter. *EC-COI-89-7.* Thus, the question is whether your work at the EPA involves either the same particular matter or is in connection with a particular matter in which you participated while a state employee.

**1. CSO Abatement and Sewage Treatment EIRs**

Participate, as defined in 1(j), requires that the level of participation be personal and substantial.[vi] Participation that is non-determinative and not part of the decision-making process is most likely to be deemed ministerial and insubstantial and, on that

basis, will not constitute "participation" under the conflict law. *EC-COI-89-7; In the Matter of John Hickey*, 1983 SEC 158, 159. However, we have expressly stated that participation in a preliminary review and approval of a proposed course of action, *EC-COI-78-1,* discussions concerning the matter, *EC-COI-80-73; 84-31*, and signing a document on behalf of a state agency, *EC-COI-83-114 86-23*, are all acts of personal and substantial participation for purposes of the conflict law. In this case, we note that the Facilities Plan/EIRs for CSO abatement and sewage treatment issues were developed by the MWRA during your tenure as chairman of the MWRA Board, were discussed by the MWRA at meetings which you attended, and were signed by you in your capacity as Secretary of EOEA. Thus, we conclude that you participated in these plans within the meaning of the conflict of interest law. Accordingly, even if the CSO abatement and Secondary Treatment Facilities Plan/EIRs were not part of the underlying litigation, 3(a) would still prohibit you from working for the EPA with regard to a later MWRA modification of these plans. *See, e.g., EC-COI-80-73*; *80-87*; *80-101.* This is the case because any attempted modification would be in relation to the original plan, since the modification would involve the same parties, the same controversy, and the same basic issue -- namely, whether the plan, when implemented, complies with the state and federal environmental laws. *See, e.g., EC-COI-92-17* (a matter is "in connection with" a particular matter if it involves the same parties, the same litigation, the same issues or the same controversy"); *see also EC-COI-81-28; 80-108*.

**2. Outfall Issues**

Although the Facilities Plan/EIR for outfall issues was completed prior to your tenure as MWRA Chairman, we conclude that, when you signed both the draft and final 301 findings, you participated in a decision that construction of the outfall, as proposed in that plan, would have the least negative impact on the environment. That "decision" is a particular matter within the meaning of the conflict law. G.L. c. 268A, 1(k); *Graham v. McGrail,* 370 Mass 133, 139 (1976).

In determining whether a new matter is "in connection" with the government particular matter, we look not only to whether the same issue or controversy is involved, but also to the effect the proposed work for the non-state party will have on the government matter. "This factor," we have said, "seeks to guard against potential abuse of past factual knowledge, confidential information, and personal associations in the context of the particular matter. It also expresses the legislative concern, which we recognized in *EC-COI-81-34,* about a former employee's 'in essence seeking to tear down that which he helped to build [or] taking advantage of a weakness that he discovered while in government service.'" *EC-COI-92-17.*

Applying this precedent, we note that the lawsuit brought under the Endangered Species Act, challenging the construction of the outfall, of necessity calls into question the validity of the 301 findings, as may other of the outfall issues under review by the EPA.[vii] Thus, your participation in that lawsuit (and any other outfall matter raising similar issues) is "in connection with" a particular matter in which you participated as a

state employee. Accordingly, we conclude that §5 prohibits you from receiving compensation from the EPA or acting as its agent in relation to these matters.

### 3. Secondary Treatment Issues

You also state that the Facilities Plan/EIRs for secondary treatment issues was completed prior to your tenure as MWRA Chairman. However, you participated in the implementation of that plan by, among other things, approving a master construction schedule and awarding contracts relative to the construction of the Deer Island facility. *See, e.g., EC-COI-89-2* (an agreement which implements a water transfer system is a particular matter) Additionally, it appears that you participated in MWRA discussions and/or votes relative to scaling back the secondary treatment plant, although the MWRA proposal to do so was not filed with the EPA until after you left state service. *See, e.g., EC-COI-89-13* (BRA discussion or votes relating to matters arising out of a linkage project are particular matters); *86-22* (discussion concerning whether to utilize a particular company's services is a particular matter); *85-67* (any vote or any discussion leading up to a vote is a particular matter).[viii/] Relying on the precedent described above, we conclude that the MWRA's proposal to scale back the secondary treatment plant (now under EPA consideration), is in connection with these particular matters; thus, your participation in these matters on behalf of the EPA is barred by §5.

### B. Federal Funding and MWRA Rates

You also ask whether you may participate in EPA discussions concerning MWRA rates and federal funding decisions that may impact on those rates. We conclude that you may.

As a state employee, you were involved in public and MWRA Board "debates" regarding MWRA rates and the need to secure federal and state funding through grants. You abstained from a motion that supported seeking state grant funding, and urged federal grant funding.

Under G.L. c. 92 App. §1-10(a), MWRA rates "shall be adopted, and on not less than an annual basis reviewed and if necessary revised," after notice and public hearing. The rates shall be sufficient to enable the MWRA to pay all current expenses, to pay all debt service on its bonds and obligations to the commonwealth, to create and maintain its reserves, to pay the costs of maintenance and replacement of sewer and waterworks systems, and to pay other obligations of the MWRA. Thus, in advance of a MWRA rate hearing, the MWRA must provide for public review its most recent financial statements, expense and capital expenditures budgets, and the proposed rate changes which the MWRA seeks. This statutory scheme suggests that MWRA rate determinations are tied to factors which vary yearly or at least periodically, and that a rate determination in a given year will have no binding effect on a future rate determination. Thus, although a MWRA rate determination is a particular matter, *see, e.g., EC-COI-85-57* (contract determination); *85-54* (permit determination); *85-19* (determination that project will adversely impact historic property); *85-11* (permit

determination), each such determination would be a separate particular matter. *See also, EC-COI-90-6; 79-34* (each application for a grant is a separate particular matter for purposes of the conflict law). Thus, the mere fact that you participated in a discussion to establish a MWRA rate or to seek a funding grant in a given year (or not), will not prohibit you from acting for the EPA with regard to a subsequent rate determination or grant.[ix]

### C. Clean Water Act Discharge Permit (NPDES)

With regard to the Clean Water Act Discharge Permit, we conclude that you have not provided us with sufficiently concrete facts on which to base an opinion that your participation in this matter is or is not barred by §3. We make the following observations, however.

You state that, while in state service, you did not participate in the NPDES Permit, which was last issued/renewed in 1986, and which is up for renewal in the coming year. You state, however, that the decision whether to renew the permit will turn on issues relating to the outfall. We advise you that were the permit renewal process to raise questions regarding the validity, efficacy, or continued viability of the Facilities Plan/EIR for outfall issues, §3 would prohibit your participation in such matters for the reasons previously articulated in section A, above. You may request additional advice from us when the precise nature of the issues relating to permit renewal and the outfall becomes clear.

### D. The Central Artery/Third Harbor Tunnel Project

Finally, you ask us whether you may participate in public hearings on a draft EIS/EIR statement for the Charles River Crossing, which was reserved as a separate, supplemental EIR in the EIR for the CA/T Project. You participated in the CA/T EIR which was developed during your tenure at the MWRA, and which you signed in your capacity as EOEA Secretary. That EIR described a plan for the Charles River Crossing project, which was approved. However, according to your counsel, state officials agreed with area residents to further study the matter and to create a supplemental EIR. The draft supplemental EIR, we are told, changes the original Charles River Crossing. EPA review of that draft EIR will focus on the impact of the Charles River Crossing project, as described in the CA/T EIR, versus the project as proposed in the draft supplemental EIR.

As we stated earlier, the CA/T EIR is a particular matter for purposes of the conflict law. *EC-COI-89-7.* You participated in that EIR, including the development and approval of the Charles River Crossing project, as described therein. The draft supplemental EIR now under consideration by the EPA seeks to modify the CA/T EIR, in which you participated, as it relates to the Charles River Crossing Project, which you approved. As discussed above, any such modification is "in connection" with the original plan. *See, e.g., EC-COI-92-17; 81-28; 80-108*. Thus, §3 prohibits your participation in the EPA review of the supplemental EIR.

In summary, 3(a) prohibits you from participating in the later stages of (i.e., challenges or modifications to) any of the Facilities Plan/EIRs covered by this request because these are particular matters in which you previously participated as a state employee. This prohibition includes any modification of the Charles River Crossing project through a supplemental EIR to the CA/T EIR in which you participated. You may, however, participate in funding decisions relative to MWRA, as these would be new particular matters. You may also participate in EPA discussions and determinations relative to the Clean Water Act Discharge Permit to the extent that those discussions and determinations do not relate in any way to matters in which you participated on behalf of the state. With regard to this latter matter, you are advised to seek additional advice from the Commission when you have specific facts.

The decision we reach here concerning the application of 3 to a federal employee is one that is required by the express language of 3 -- "anyone other than the commonwealth or a state agency." If the application of that section to federal employees in situations such as yours is to be changed, we think that it is the state legislature which must act to do so.[x/]

**Section 23**

You are also subject to 23(c) which prohibits you from disclosing confidential information which you acquired while EOEA Secretary and Chairman of the MWRA. As we said in similar circumstances in *EC-COI-89-7*, confidential information is that information which is unavailable to the general public, and "is to be distinguished from information that, although not well known, is a matter of public record."

**DATE AUTHORIZED:** May 10, 1994

*Pursuant to G.L. c. 268B, 3(g), the requesting person has consented to the publication of this opinion with identifying information.

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[i/] Gen. Laws c. 30, '61 provides, in relevant part:

> All agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use practicable means and measures to minimize damage to the environment. . . . Any determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact.

[ii/] Section 5(b) prohibited you, as a former state employee, within one year of leaving state service, from appearing personally on behalf of anyone, other than the Commonwealth or a state agency, before any state agency in connection with any matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest and which was under your official responsibility in the two years

prior to leaving state service. This prohibition no longer applies to you because you left your state position more than three years ago.

[iii]/We believe that the application of '5 to you is consistent with the policy concerns underpinning this statute. Like the Code of Professional Responsibility for Attorneys (Code), G.L. c. 268A, '5, and the federal statute on which it is modeled (18 U.S.C. '207), are aimed at the "deep public uneasiness with officials who switch sides." S. Rep. No. 170, 95th Cong. 2d Sess. 32 *reprinted in* 1978 U.S. Cong. & Ad. News 4216, 4218; *see also EC-COI-92-17* ('5(a) is aimed at "protect[ing] the government where it needs realistic protection," i.e., in connection with "matters with which [formeR employees] had contact while in the government -- matters wherein they have true conflicts of interest.") We note that federal courts applying the Code have similarly prohibited former federal attorneys from representing other levels of government on matters substantially related to matters they handled on behalf of the federal government. *See, e.g., General Motors Corp. v. City of New York,* 501 F.2d 639 (2d Cir. 1974) (former Justice Department lawyer disqualified from representing City of New York in suit substantially similar to one filed by him while in federal service).

[iv]/We are aware that the Federal government has promulgated a conflict of interest law. *See* 18 U.S.C. '201 *et. seq.* In promulgating G.L. c. 268A, which is modeled after the federal scheme, Massachusetts has enacted its own conflict law to protect the integrity of public employees from conflicting activities during and after leaving public service. The Massachusetts statute serves important state interests, just as the Federal conflict law preserves the integrity of Federal officials and employees during and after their federal service. You have pointed to nothing in the federal scheme, however, (and we have found nothing) which amounts to a clear expression that the federal government has acted to preempt the entire field in this area.

[v]/We point out that you have previously received both written and oral advice from this Commission regarding the existence and scope of G.L. c. 268A, '5 as it relates to these and other post-state employment activities.

[vi]/"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, '1(j).

[vii]/You tell us that the EPA "will need to address a number of outfall issues in the Boston Harbor case during the coming year." However, because you have not given us specific facts concerning these issues, our advice with regard to them, of necessity, is general in nature.

[viii]/We also note that you were the Chairman of the MWRA during the May 23, 1990 meeting at which Professor Harleman's theories were discussed. The Supreme Judicial Court has held that "to preside" over a matter is "to participate" for purposes of G.L. c. 268A. *Graham, supra,* 370 Mass. at 138. Thus, if you presided over that meeting by "recogniz[ing] people to speak on the matter in question, determin[ing] the order of speakers, cut[ting] off debate or the remarks of any individual speaker, or refus[ing] to recognize someone," you will be deemed to have participated in the discussion and vote, if any, that the MWRA pursue its investigation of Professor Harleman's claims. *Matter of John Hickey*, 1983 SEC 158, 159.

[ix]/In so finding, we presume that the rate setting determinations by the MWRA have not been subject to review by the federal court.

[x/] Our view that '5 is applicable to a former state employee's subsequent employment by the federal government is buttressed by our examination of the legislative history of 18 U.S.C. '207, on which '5 is modeled. As originally enacted in 1962, '207 prohibited a former federal employee from acting as agent or attorney (i.e., representing, advising, etc.) for anyone other than the United States, in a matter in which the United States was a party or had a direct and substantial interest, and in which the former federal employee had participated personally and substantially while in federal service. The breadth of the prior '207 prohibition has been interpreted by commentators and by the U.S. Office of Government Ethics to include a former federal employee's representation of a state or local government. *See* Note, *Developments -- Conflict of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1434 n. 88 (1988); *see also* 5 C.F.R. '2637.101(c)(5). Although '207 has since been amended (in 1989) to permit certain acts of a former federal employee "done in carrying out official duties as an employee of an agency or instrumentality of a State or local government," 18 U.S.C. '207(j)(2), General Laws c. 268A, '5 has not been similarly amended. We conclude, therefore, that absent state legislative action to the contrary, '5 is applicable in situations such as this one.